

Secretary

U.S. Department of Homeland Security  
Washington, DC 20528



Homeland  
Security

January 17, 2008

The Honorable Patrick Leahy  
United States Senate  
Washington, D.C. 20510

Dear Senator Leahy:

Thank you for your December 19, 2007 letter inquiring about the legal basis for the Department of Homeland Security's decision to end oral declarations at the border prior to the June 1, 2009 date in the Omnibus Appropriations Act for implementation of the Western Hemisphere Travel Initiative (WHTI).

As explained below, the Department's decision to end oral declarations is entirely consistent with the Omnibus Appropriations Act. But from a practical standpoint, it also will eliminate a vulnerability that has existed for too long at our borders.

Under the current system, some travelers may enter the United States simply by saying that they are Americans. This, of course, limits our ability to prevent terrorists and others who may seek to do us harm from entering the country. But allowing someone to so easily gain access to our country from, say, Canada, also undermines our efforts against illegal immigration. It simply defies logic that during a period in which the Department is using every weapon in its arsenal to increase enforcement against illegal immigration, we should continue a practice that allows certain people to enter our country based solely on their word. Frankly, the only aspect of this change that is reasonably open for debate is why we waited so long to implement it.

Our concerns over the use of oral declarations are compelling. In fact, from just October to December 2007, CBP officers reported 1,517 false oral claims by individuals claiming to be U.S. citizens who were not. On one such occasion, CBP determined that an individual falsely claiming U.S. citizenship had an outstanding arrest warrant for homicide in California. The individual was paroled into the United States and transported into the custody of the San Diego Sheriff's Department. Although CBP successfully identified and apprehended this individual, and many others, the potential vulnerability remains. We do not know how many false oral declarations we miss.

The Government Accountability Office has repeatedly echoed our concern over this aspect of existing border procedures, saying: "CBP faces a much greater challenge to identify and screen individuals at land ports of entry...Unlike travelers who enter the country at airports, travelers entering through land ports of entry can arrive at virtually any time and may present thousands of

different forms of documentation...” (GAO-08-219, Border Security: Despite Progress, Weaknesses in Traveler Inspections Exist at Our Nation’s Ports of Entry). GAO further noted: “U.S. and certain Canadian citizens are exempt from having to present any document upon entry. Instead, they can make an oral claim of citizenship, if this satisfies the inspector. According to immigration data, inspectors at land border ports intercepted nearly 15,000 people in 2002 who falsely claimed to be U.S. citizens in order to gain illegal entry, suggesting an unknown number of travelers successfully entered the United States this way.” (GAO-03-902T, Border Security: Challenges Facing the Department of Homeland Security in Balancing its Border Security and Trade Facilitation Missions).

The change on January 31, 2008 will do more than just end oral declarations. It also will sharply reduce the number of current documents that CBP may accept at primary inspection. This, however, is not implementing WHTI. As discussed below, when WHTI is implemented CBP will accept *only* WHTI-compliant documents at the border. Because Congress has delayed implementation, until that time, CBP will continue to accept certain existing documents, such as birth certificates and driver’s licenses. But as of January 31, 2008, we will no longer credit documents that we have determined are virtually unverifiable and, therefore, are easily forged by those seeking to enter the United States unlawfully. Nothing in the 2007 Appropriations Act, as I read it, compels us to continue to credit literally thousands of inadequate documents as permission to enter the United States.

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To explain why these changes to CBP procedure are consistent with the recent Appropriations Act, a bit of background is useful. Under the Immigration & Nationality Act, no one may enter the United States without a passport unless that requirement is waived. See 8 U.S.C. §§ 1185(b) (U.S. citizens); 1182(d)(4)(B) (certain nonimmigrant aliens). For many years, these waivers were effected through CBP regulations for U.S., Canadian, and Bermudian citizens entering the United States from countries in the Western Hemisphere at land or sea ports-of-entry. See 22 C.F.R. § 53.2 (U.S. citizens); 8 C.F.R. § 212.1(a)(1), (2) (Canadian and Bermudian nonimmigrant aliens).

Section 7209 of the Intelligence Reform and Terrorism Prevention Act (IRTPA) required an end to these waivers. More specifically, section 7209 states that the Secretary must require either a passport or other WHTI acceptable documents that sufficiently denote the identity and citizenship of U.S., Canadian, and Bermudian citizens for entry.

As the Department explained in its joint notice of proposed rulemaking (NPRM) with the Department of State on June 26, 2007, pursuant to section 7209, when WHTI is implemented, travelers at U.S. ports-of-entry will be limited to the following documents: a valid passport (with visa, if required); a valid passport card; a valid trusted traveler card (NEXUS, FAST, or SENTRI); a valid Enhanced Driver’s License or Tribal Card designated by the Secretary; a valid Merchant Mariner Document, when traveling on official maritime business; or a valid U.S. Military identification card when traveling on official orders. See 72 Fed. Reg. 35,088.

Congress first required WHTI to be implemented by January 2008. Later, in the FY 2007 Appropriations Act, Congress required DHS to make certain findings before it could implement, effectively delaying WHTI. In the most recent Appropriations Act, Congress has again sought to delay WHTI implementation, mandating that WHTI not be implemented until at least June 1, 2009. The Department is complying with the Act by not implementing WHTI before that date.

This effectively maintains the current state of the law until June 2009. In other words, DHS – through CBP – has under current law, unchanged by IRTPA or the Appropriations Act, the traditional authority and discretion to determine what will be required for entry into the United States.<sup>1</sup> It is this authority that is the basis for any adjustments to border requirements.

Accordingly, the change in procedure regarding oral declarations is *not* WHTI implementation. To be sure, the WHTI NPRM provided the public with notice of a change to CBP procedures, separate from the Department’s efforts to implement WHTI. But the change is based on the Secretary’s longstanding statutory and regulatory discretion to control the border, and provides that beginning January 31, 2008, CBP will no longer accept oral declarations alone as proof of citizenship or identity at land and sea border ports-of-entry. Instead, all travelers will be expected to present documents proving citizenship, such as a birth certificate, and government-issued documents proving identity, such as a driver’s license, when entering the United States through land and sea ports-of-entry. CBP published additional notice of this change in the *Federal Register* on December 21, 2007. See 72 Fed. Reg. 72,744.

Finally, because this is a change to CBP procedures, and is consistent with existing regulations, it is exempt from notice and comment rulemaking requirements under the Administrative Procedure Act. See 5 U.S.C. § 553(b). Nevertheless, as noted, the Department provided the public advance notice of this change and the opportunity to comment in the WHTI NPRM and again in December 2007.

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Although the procedural change outlined above is separate from the Department’s efforts to implement WHTI, its aim of reducing potential vulnerabilities at the border is consistent with

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<sup>1</sup> The President, and by delegation the Secretary of Homeland Security, has broad authority to control the travel of U.S. citizens and aliens entering and departing the United States. “Unless otherwise ordered by the President, it shall be unlawful for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.” 8 U.S.C. § 1185(a)(1). Likewise, “[e]xcept as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid United States passport.” 8 U.S.C. § 1185(b). Current regulations implementing these authorities provide the Secretary with discretion to determine what documents, if any, U.S. citizens and aliens must present at U.S. ports-of-entry. For example, “[a] person claiming to be a U.S. citizen must establish that fact to the examining officer’s satisfaction and must present a U.S. passport if such passport is required . . . .” 8 C.F.R. 235.1(b). Aliens must “present whatever documents are required and must establish to the satisfaction of the inspecting officer that the alien is not subject to removal . . . .” 8 C.F.R. 235.1(f)(1).

WHTI's purpose. While WHTI implementation may be postponed, our need to tighten border security is not.

Successful implementation of both the procedural change and WHTI means extensive public communication. Since the publication of the NPRM, DHS has continually alerted the traveling public to the January 31 change in public appearances by headquarters and field staff, in multiple press releases and media pushes, and on the CBP website. Field musters have been conducted for CBP front-line personnel, and tear sheets have been distributed to travelers crossing the land border. Training is being provided to front-line field offices so that all CBP front-line land border officers will be prepared prior to January 31. As the January 31 change is implemented, CBP will also closely monitor daily operations for traveler compliance and nationwide operational impact.

DHS is committed to ensuring a smooth transition and mitigating any negative impacts as we move forward with this critical change, and we will continue to demonstrate flexibility to certain travelers based upon unique and exigent circumstances. At the same time, the Department is committed to its responsibility to control the country's borders and keep out those who seek to harm us or evade our immigration laws. Quite simply, we would be irresponsible if we continued to allow people to enter the United States based on no more than their own say so.

If we may be of further assistance, please contact my office or the Office of Legislative Affairs at (202) 447-5890.

Sincerely,



Michael Chertoff